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NO. A-94

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1991

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, *et al.*
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does the Employee Retirement Income Security Act (ERISA) abrogate a State's Eleventh Amendment immunity from suit in federal court?

(2) Does ERISA preempt a State's general tax remedies, thereby requiring suit in federal district court by ERISA Plaintiffs and making the Tax Injunction Act "inapplicable"?

(3) If the federal courts have jurisdiction over these cases, does any part of the Texas Administrative Services Tax Act (ASTA) constitute a valid exercise of the State's authority to regulate and tax the business of insurance?

(4) If the State must refund ASTA taxes from the State Treasury in an ERISA action in federal court, what is the proper measure of prejudgment interest?

LIST OF PARTIES

Petitioners, Defendants/Appellants below, are officers of the State of Texas, namely: Philip W. Barnes, successor to A. W. Pogue, Commissioner of the Texas State Board of Insurance; Richard F. Reynolds, member of the Texas State Board of Insurance; Claire Korioth, successor to Paul Wrotenbery, member and Chairman of the Texas State Board of Insurance; Allene Evans, member of the State Board of Insurance; Kay Bailey Hutchison, successor to Ann Richards, State Treasurer of Texas; and Dan Morales, successor to Jim Mattox, Attorney General of Texas[1].

Respondents, Plaintiffs/Appellees below, are various ERISA plans, trustees, administrators and sponsors, namely: E-Systems, Inc. Group Hospital, Medical and Surgical Insurance Plan, E-Systems, Inc. Group Hospital Medical, Surgical, Major Medical, Prescription Drug and Weekly Income Disability Benefit Plans, E-Systems, Inc. Group Hospital Medical, Surgical, Major Medical and Weekly Income Disability Benefit Plan, E-Systems, Inc. Health Care and Weekly Income Disability Plans, E-Systems, Inc. Dental Expense Coverage Plan, E-Systems, Inc. Employee Benefit Trust, NCNB

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[1] Petitioners will be referred to as "the State".

Texas National Bank Dallas, National Association, Trustee; US Sprint Group Health Insurance Plan, US Sprint Communications Company, a New York General Partnership, as Plan Administrator; Kimberly-Clark Corporation Medical Plan, Kimberly-Clark Corporation Dental Plan, Kimberly-Clark Health Benefits Trust, The First National Bank of Neenah, Trustee; Spenco Group Medical Plan, Spenco Medical Corporation, a Texas Corporation, as Plan Administrator; Group Life and Health Insurance Plan for Hourly Employees represented by the American Federation of Grain Millers, the Employee Group Insurance Plan for Pillsbury General Hourly Employees, Steak & Ale Group Benefit Plan for Restaurant Hourly Employees, the Group Insurance Plan for Pillsbury Salaried Employees, the Group Insurance Plan for Burger King Hourly Employees, the Group Insurance Plan for Burger King Salaried Employees, the Pillsbury Group Employees Health Benefit Trust; First Bank, National Association, Trustee, the Greyhound Lines, Inc. Salaried Employees Medical, Dental Benefits Plan ASO-19861-7, Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Plan, Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Trust; Kevin Bolton, Jerry Hatalla, et al., Trustees; Eagle Manufacturing, Inc. Salaried Employees Medical, Dental Benefits Plan ASO-19861-7, Kevin M. Bolton, as Plan Administrator; Shell Hospital

Surgical Medical Program, Shell Hospital Surgical Medical Program Trust, Texas Commerce Bank, National Association, Trustee, Shell Dental Assistance Plan, Shell Dental Assistance Plan Trust, Texas Commerce Bank, National Association, Trustee, Shell Flexible Spending Account Plan, Shell Oil Corporation, a Delaware corporation, as plan administrator; Texas Carpenters Health Benefit Fund, Texas Carpenters Health Benefit Trust, Harold E. Moore, J. P. Long, Jr., et al.; Trustees, La Quinta Motor Inns, Inc., as employer and sponsor of the La Quinta Employee Health Plan[2].

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[2]Respondents will be referred to collectively as "Respondents".

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Philip W. Barnes, Commissioner of Insurance of the State of Texas, Richard F. Reynolds, Member of the State Board of Insurance of Texas, Claire Korioth, Chairman of the State Board of Insurance of Texas, Allene Evans, Member of the State Board of Insurance of Texas, Kay Bailey Hutchison, Treasurer of Texas and Dan Morales, Attorney General of Texas (the State) respectfully pray that the Court grant a writ of

certiorari to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on May 1, 1991, and May 14, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the district court's summary judgment granting an injunction and ordering a refund of taxes, is published at 929 F.2d 1100 and is reprinted in the appendix, ***infra***, p. 1a. A separate, unpublished opinion was rendered on the issue of prejudgment interest and is reprinted in the appendix, ***infra***, p. 14a. The cases are now consolidated for appeal.

The Court of Appeals' order denying the State's motions for rehearing is reprinted in the appendix, ***infra***, p. 73a. Upon application by the State a stay of the judgments below was granted by the Honorable Antonin Scalia on August 2, 1991. Justice Scalia's order and opinion are reprinted in the appendix, ***infra***, p. 17a and 19a.

The district court's orders and injunctions against the State in the present cases were expressly based on its prior judgment and orders in ***Birdsong v. Olson***, 708 F.Supp. 792 (W.D. Tex. 1989), ***appeal dismissed, sub nom., Birdsong v. Wrotenbery***, 901 F.2d 1270 (5th Cir. 1990).

The district court's orders in the present cases are reprinted in the appendix, (denying motions to dismiss) *infra*, p. 26a and 27a, (granting summary judgments) *infra*, p. 48a and 55a (and awarding interest) *infra*, p. 63a and 70a. The district court's order of November 17, 1988, denying Defendants' motions to dismiss in *Birdsong* is reprinted in the appendix, *infra*, p. 29a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgments of the Court of Appeals under 28 U.S.C. §1254(1) (Supp. 1991). Respondents invoked jurisdiction of the district court pursuant to 28 U.S.C. §§1331 and 1337 (Supp. 1991), and 29 U.S.C. §1132(a)(3), (d)(1) and (e) (1985). The judgments and opinions of the Court of Appeals which are sought to be reviewed were entered on May 1, 1991 and May 14, 1991. After consolidation of the summary judgments with the interest orders, the State's petition for rehearing and suggestion for rehearing en banc were denied on June 10, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

Tax Injunction Act, 28 U.S.C. §1341 (1976).

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

TEX. TAX CODE ANN. §112.051 (Vernon 1982)[1]
Act of June 10, 1981, 67th Leg., Ch. 389
1981 Tex. Gen. Laws 1490, 1514 (amended subsequently)

§112.051. Protest Payment Required

(a) If a person who is required to pay to any department of the state government an

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[1]For taxes under the Texas Insurance Code, the State's tax protest provisions were transferred in 1989 to the TEX. GOV. CODE ANN. §§ 403.201-403.211 (Vernon 1990).

occupation, gross receipts, franchise, license, or other privilege tax or fee contends that the tax or fee is unlawful or that the department may not legally demand or collect the tax or fee, the person shall pay the amount claimed by the state, and if the person intends to bring suit under this subchapter, the person must submit with the payment a protest.

TEX. TAX CODE ANN. § 112.052(a) (Vernon 1982).

§ 112.052. Taxpayer Suit After Payment Under Protest

(a) A person may bring suit against the state to recover an occupation, gross receipts, franchise, license, or privilege tax or fee required to be paid to the state, if the person has first paid the tax under protest as required by Section 112.051 of this code.

TEX. TAX CODE ANN. §112.060(a) (Vernon 1982). Act of June 10, 1981, 67th Leg., Ch. 389, 1981 Tex. Gen. Laws 1490, 1514, (amended subsequently).

§112.060. Refund

(a) If a suit under this subchapter results in a final determination that all or part of the money paid under protest was unlawfully demanded by the public official and belongs to

the taxpayer, the treasurer shall refund the proper amount, with pro rata interest earned on that amount, by the issuance of a refund warrant.[2]

TEX. TAX CODE ANN. § 112.101(a) (Vernon 1982)[3] Act of June 10, 1981, 67th Leg., Ch. 389, 1981 Tex. Gen. Laws 1490, 1514, (amended subsequently).

§ 112.101. Requirements Before Injunction

(a) No restraining order or injunction that prohibits the collection of a state tax; license, registration, or filing fee; or statutory penalty assessed for the failure to pay the state tax or fee may be granted in this state or may be granted against a state official or a representative of an official in this state unless the applicant for the order or injunction has first:

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[2]For taxes under the Texas Insurance Code, this provision was amended in 1989 to provide a tax credit or a refund at the beginning of the State's fiscal biennium for amounts recovered under a final judgment in a protest suit. TEX. GOV. CODE ANN. §403.211 (Vernon 1990).

[3]For taxes under the Texas Insurance Code, the State's tax injunction provisions were amended and transferred in 1989 to the TEX. GOV. CODE ANN. §§403.212-403.221 (Vernon 1990).

(1) paid into the suspense account of the treasurer all taxes, fees, and penalties then due by the applicant to the state; or
(2) filed with the treasurer a good and sufficient bond to guarantee the payment of the taxes, fees, and penalties in an amount equal to twice the amount of the taxes, fees, and penalties then due and that may reasonably be expected to become due during the period the order or injunction is in effect.

Employee Retirement Income Security Act
29 U.S.C. §1132(a)(3) (1985).

A civil action may be brought--

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Employee Retirement Income Security Act §502(e)(1), 29 U.S.C. §1132(e)(1) (1985).

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Employee Retirement Income Security Act §514(a), 29 U.S.C. §1144(a) (1985).

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Employee Retirement Income Security Act §514(b)(2), 29 U.S.C. §1144(b)(2) (1985).

(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of

any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Employee Retirement Income Security Act §514(d), 29 U.S.C. §1144(d) (1985).

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

McCarran-Ferguson Act 15 U.S.C. § 1012(a) (1976).

(a) The business of insurance, and every person engaged therein, shall be subject to the

laws of the several States which relate to the regulation or taxation of such business.

Administrative Services Tax Act
TEX. INS. CODE ANN. art. 4.11A
Sec. 4 (d) (Vernon Supp. 1991).

(d) Notwithstanding any other provision of this article, the tax imposed under this article creates no duty and shall not be collected to the extent preempted or prohibited under the constitution of this state or the United States. It is the intent of the legislature that this article not apply to any person, risk, or transaction to which it may not lawfully apply under the constitution of this state or the United States.

STATEMENT OF THE CASE

The Administrative Services Tax Act, TEX. INS. CODE ANN. Art. 4.11A, (ASTA) was passed in 1987, and required the first payment of the tax to be made on or before March 1, 1988. ASTA levies a tax on any fees received for administrative services performed by licensed insurance companies and others under an administrative services contract on behalf of health benefit plans. ASTA §§[1], 2. Respondents, except La Quinta Motor Inns, Inc. (La Quinta),

initially attacked ASTA by filing a tax protest suit in state court contending that ASTA was preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001, *et seq.* (1985) (ERISA). These Respondents' plans and trusts paid the tax even though they were not advised or required to do so by the State. These Respondents later claimed that the State would be unable to refund the taxes if they won their protest suit, so they sought and obtained an injunction from the state district court to prohibit enforcement of ASTA on the grounds that it was preempted by ERISA.[4]

These Respondents subsequently filed a suit in federal district court and obtained an injunction and monetary relief relying among other things upon the injunction already granted in the state district court. The federal district court, following its rationale in ***Birdsong***, denied the State's motions to dismiss and granted the injunction in a summary judgment. La Quinta, having paid to the State some ASTA tax without protest and without filing any state tax suit, also obtained an injunction based on ***Birdsong***.

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[4]This state suit is pending on appeal, having been stayed by the State Court of Appeals as a result of the parallel federal litigation. The State contends in that appeal that Respondents failed to follow the statutory requirements for a tax injunction and that they have an adequate remedy at law under the protest statutes.

The district court awarded prejudgment interest to the Respondents corresponding to the rate of income which would have been received from plan investments rather than the "pro rata" interest paid to prevailing tax litigants under the state protest statutes or the rate in 28 U.S.C. § 1961 (Supp. 1991) (which Respondents requested). These interest rates ranged from 7.262% up to 11.770%, and were in fact based on rates of short term commercial borrowing, internal corporate rates of return, revolving/term working capital loans and other unspecified measures.

After consolidation of La Quinta with the other Respondents, the Court of Appeals affirmed the district court's summary judgments enjoining enforcement of the tax and ordering a refund of taxes from the State Treasury. In a separate opinion the Court of Appeals affirmed the orders on prejudgment interest. After consolidation of the summary judgments with the interest orders, the Court of Appeals denied Petitioners' petition for rehearing and suggestion for rehearing en banc.

ARGUMENT TO ALLOW THE WRIT

It is no exaggeration to say that these are cases of great constitutional importance. Fundamental principles of Our Federalism have been tossed aside without comment by the Court

of Appeals in favor of ERISA's "preemption factor".

The Court of Appeals entirely failed to address the State's Eleventh Amendment defense while ordering a refund of taxes and interest from the State Treasury. The Court of Appeals simply assumed that ERISA preempts the State's general tax remedies, depriving state courts of jurisdiction over state tax disputes and making the Tax Injunction Act "inapplicable". Either of these errors is sufficiently serious to justify a grant of certiorari by this Court. Together, they compel it.

The Court of Appeals erred in these cases by failing to recognize the simple and obvious fact that states are not like other litigants in federal court. The constitutional sovereign status of state governments cannot be circumvented or cancelled by implication and by silence. No interest in the uniformity of ERISA enforcement requires or justifies state courts to be deprived of jurisdiction over state tax matters. These cases should be dismissed for lack of jurisdiction.

THE ELEVENTH AMENDMENT

The most egregious and shocking error of the Court of Appeals is its failure even to attempt the Eleventh Amendment analysis

necessary to justify payments of damages from the State Treasury in a federal statutory action. ***See, e.g., Pennsylvania v. Union Gas Co.***, 491 U.S. 1 (1989). Even if Respondents established federal jurisdiction to obtain an injunction under the ***Young*** fiction, the constitutional limitation on retrospective relief would prevent their recovery of funds from the State Treasury. ***Ex parte Young***, 209 U.S. 123 (1908). ***Edelman v. Jordan***, 415 U.S. 651 (1974). The Eleventh Amendment, unlike the Tax Injunction Act, does not prohibit a suit against state officers for prospective injunctive relief against a tax, but it does prohibit recovery of any of the taxes paid by Respondents in these cases. ***Id.***

As recently as last term this Court was required "once again to mark the boundaries of state sovereign immunity from suit in federal court." ***Blatchford v. Native Village of Noatak and Circle Village***, 111 S.Ct. 2578 (1991). Unfortunately the Court's consistent and repeated pronouncements on the Eleventh Amendment seem to have fallen upon deaf ears in these cases.

It is not disputed that the State is the real party in interest in this litigation. ***E-Systems, Inc. Group Hospital, Medical and Surgical Insurance Plan, et al. v. Pogue***, 929 F.2d 1100 (5th Cir. 1991). ***Ford Motor Co. v. Department of Treasury***, 323 U.S. 459 (1945). "[W]hen the action is in essence one for

the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, at 464.

There are three ways under the Constitution to maintain a suit in federal district court for damages against a State. Two are easily eliminated. Respondents are not the government of another state or the federal government. The State has not consented to be sued in federal court in these actions, and no argument is made that it has. That leaves one possibility. The State may be sued by private persons in federal district court for money damages if Congress has abrogated the State's sovereign immunity.

"Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." ***Atascadero State Hospital v. Scanlon***, 473 U.S. 234, 242 (1985). "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Id.*, at 246.

"Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of law, evidence of congressional intent must be both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Even "frequent reference to the States" in a statute, which would "make the States ... logical defendants", creates only a "permissible inference" that Congress intended to subject the States to the federal statutory cause of action. *Id.*, at 232. "It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its power of abrogation." *Id.* Sadly, the Court of Appeals does not even purport to find statutory language sufficient to meet the test of abrogation.

Under the most generous view of the Court of Appeals' implicit opinion, the State is subject to an ERISA suit for damages in federal court because of ERISA's grant of "exclusive jurisdiction". The district court at least stated this rationale explicitly. "By vesting the exclusive jurisdiction of civil actions relating to the preemption of state tax laws in the federal district courts, Congress has abrogated the State's Eleventh Amendment immunity". Appendix, p. 45a. This is wrong.

Exclusive federal jurisdiction by itself does not abrogate a state's immunity from suit in federal court. ***Hoffman v. Connecticut Dep't of Income Maintenance***, 492 U.S. 96 (1989). ***Accord, Chew v. California***, 893 F.2d 331 (Fed. Cir.) ***cert. denied,*** 111 S.Ct. 44 (1990); ***Lane v. First National Bank*** , 871 F.2d 166 (1st Cir. 1989); ***BV Engineering v. University of California, Los Angeles,*** 858 F.2d 1394 (9th Cir. 1988), ***cert. denied***, 489 U.S. 1090 (1989); ***Richard Anderson Photography v. Brown***, 852 F.2d 114 (4th Cir. 1988), ***cert. denied*** 489 U.S. 1033 (1989). "The fact that Congress grants ***jurisdiction*** to hear a claim does not suffice to show Congress has abrogated all ***defenses*** to that claim. The issues are wholly distinct." ***Blatchford, supra,*** at 2585, n.4. (emphasis original).

Silence on the part of Congress regarding the State's amenability to a suit for damages under a federal statute is no justification for an abrogation of the State's immunity from suit even when the State is expressly made subject to the federal statute. ***Employees v. Department of Public Health & Welfare***, 411 U.S. 279 (1973). Similarly, if ERISA must be enforced by an action for damages against a state, Congress has adequately dealt with state sovereign immunity by providing that the Secretary of Labor may bring suit. Id. 29 U.S.C. §1132(a)(5) (1985).

The Court of Appeals, however, in its headlong rush to condemn ASTA, charged blindly

past the State's jurisdictional defense under the Eleventh Amendment. "Having concluded that ASTA is preempted by ERISA we need proceed no further. The State received monies from the ERISA plans to which it was not entitled. The funds must be returned." ***E-Systems***, at 1104, Appendix, p. 11a. In affirming the district court's orders on interest the Court said that "[w]hether characterized as an award of damages or as prejudgment interest ... the ERISA plans are made whole ...". Appendix, p. 16a. While such clear equitable sensibilities are appropriate in every case, they cannot override constitutional limitations. ***Edelman, supra; Ford Motor Co., supra.***

The decision to ignore the Constitution is especially troublesome in view of the fact that the State's prior appeal of the ASTA/ERISA litigation was dismissed after the Court of Appeals ***sua sponte*** raised and vigilantly enforced its jurisdictional concerns regarding Fed. R. Civ. P. 59(e). ***Birdsong v. Wrotenbery***, 901 F.2d 1270, 1271 (5th Cir. 1990)[5]. Jurisdictional issues

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[5]The State has accepted the consequences of its procedural error in the prior litigation, but should not have to accept the gross omission of an essential constitutional issue. The State has refunded approximately $9 million as a result of the prior litigation in ***Birdsong***. Approximately $40 million more may be refunded if ASTA is finally determined to be invalid in its entirety by the state courts. If this determination is made in federal court, the cost will be higher because of claims by non-protesting taxpayers, additional interest and damages, and the possible award of attorneys' fees against the State.

arising under the Constitution deserve comment at least as much as jurisdictional issues arising under the Rules of Civil Procedure.

It is thoroughly wrong and thoroughly incredible that a federal court would order a State to pay damages to private litigants in a federal suit without even addressing the Eleventh Amendment. This Court must not tolerate such a radical and insupportable departure from constitutional jurisprudence and from this Court's clear and consistent precedents.

THE TAX INJUNCTION ACT

The Court of Appeals' analysis of the Tax Injunction Act is not much better than its analysis of the Eleventh Amendment. The Tax Injunction Act, properly viewed, requires dismissal of these federal court cases in their entirety. The Tax Injunction Act drastically limits jurisdiction over suits in federal district court to enjoin state taxes if an adequate remedy may be had in state court. A state must provide a full hearing and judicial determination in which a person may raise federal objections, but need not provide a remedy as complete as that in federal court in order for its remedy to be adequate. ***Rosewell v. La Salle National Bank***, 450 U.S. 503 (1981).

The Tax Injunction Act reflects the principles of federalism which have long motivated federal courts to exercise restraint in the area of state tax administration. ***California v. Grace Brethren Church***, 457 U.S. 393 (1982); ***Dows v. City of Chicago***, 78 U.S. (11 Wall.) 108 (1870); ***Matthews v. Rodgers***, 284 U.S. 521 (1932); ***Fair Assessment in Real Estate v. McNary***, 454 U.S. 100 (1981). Its basic premise is that state tax litigation belongs in state courts, even when federal law issues may determine the outcome. ***See, e.g., Franchise Tax Board v. Alcan Aluminium, Ltd.***, 493 U.S. 331 (1990).

The Tax Injunction Act represents the judgment of Congress that even concurrent federal jurisdiction over state taxes unnecessarily impinges on the principles of federalism according to which the states conduct their sovereign affairs. The Court of Appeals, with the same regard it showed for those principles in its view of the Eleventh Amendment, simply assumed that ERISA ousted state courts of their jurisdiction over this most sensitive and essential sovereign activity, control of state revenues. The Court of Appeals apparently did not question the adequacy of the State's tax remedies, per se, but in effect held them to be useless in the face of an omnipotent ERISA.

ERISA does not "alter, amend, modify, invalidate, impair or supersede any law of the United States ... ." 29 U.S.C. §1144(d) (1985). "The applicability of the Tax Injunction Act, therefore, is apparently unaffected by ERISA." ***Ashton v. Cory***, 780 F.2d 816, 818 (9th Cir. 1986) (Kennedy, J.). The Court of Appeals in ***E-Systems***, however, concluded that the Tax Injunction Act does not apply "because of the preemption factor". ***E-Systems***, at 1102, Appendix, p. 6a. "State Courts lack jurisdiction to decide the dispositive issue in this case -- whether ERISA preempts ASTA. It necessarily follows that there can be no effective State remedy under the Tax Injunction Act which, therefore, is inapplicable in an ERISA setting." ***Id.*** The sole explanation and support relied upon by the Court of Appeals "to take the drastic step of carving out an exception to the Tax Injunction Act" (***Ashton, supra***, at 822) is "the preemption factor".

If a tax litigant has an adequate remedy in state court, the Tax Injunction Act requires that suit be brought there regardless of any federal complaints which might otherwise be available. Without articulating its premises as to why state courts would lack jurisdiction to judge the state's own tax statutes, the Court of Appeals effectively held that general state tax remedies are displaced by ERISA whenever ERISA issues are raised. The district court also asserted that

state courts lacked jurisdiction to decide the preemption issue. Appendix, p. 34a. Obviously, the statutory tax remedies do not otherwise 'relate to' ERISA. By implication, the Court of Appeals concluded that ERISA preempts the right of an ERISA party to bring a "well-pleaded complaint" under a state tax statute.

It is true that state causes of action may sometimes be displaced by federal preemption as a result of a corollary to the "well-pleaded complaint rule". ***Avco Corp. v. Machinists***, 390 U.S. 557 (1968); ***Metropolitan Life Ins. Co. v. Taylor***, 481 U.S. 58 (1987). It is not true that ERISA automatically preempts state law causes of action any time an ERISA issue is raised. ***Franchise Tax Board v. Construction Laborers' Vacation Trust***, 463 U.S. 1 (1983) (*CLVT*).[6] ***Mackey v. Lanier Collections Agency & Service, Inc.***, 486 U.S. 825 (1988). The general rule is that state causes of action will not be pre-empted. ***Taylor, supra***.

ERISA provides exclusive federal court jurisdiction "of civil actions under this subchapter." 29 U.S.C. §1132(e)(1) (1985). "In ***Franchise Tax Board***, the Court held that ERISA preemption, without more, does not convert a state claim into an action arising under federal law." ***Taylor, supra***, at 64. "As we said in ***Gulley***:

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[6]The interplay between the Tax Injunction Act and ERISA at issue in these cases was alluded to but not addressed by the *CLVT* court. ***Id.***, at 20 n.21, 27 n.31.

'By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.'" ***CLVT, supra***, at 12. Even if ERISA entirely preempted ASTA, a state tax protest or injunction suit, "by unimpeachable authority", would not arise under ERISA.

The Court of Appeals erroneously saw no distinction between ***Taylor***'s unanimous decision that ERISA-related claims of a beneficiary are exclusively federal and ***CLVT***'s unanimous holding that a state tax claim "is not of central concern to the federal statutes." ***CLVT, supra***, at 25-26. Because preemption is a matter of congressional intent, an analysis of that intent is necessary to determine whether ERISA displaces normally available state tax remedies. Quoting a Congressional conference report, the ***Taylor*** court noted that "[w]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan ... such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under §301 ... ." ***Taylor, supra***, at 65-66.

Extensive federal pre-emption of state law is generally not favored. ***See, e. g., Wisconsin Public Intervenor v. Mortier,*** 111 S.Ct. 2476 (1991). Legislative history and statutory language supported ***Taylor***'s view that ERISA benefit

claims are intended to be exclusively federal, and the Court cited two more examples of that clear intent in the Congressional Record. *Id.*, at 66. The *Taylor* court "would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to §301 of the LMRA" without the "parallels" of the civil enforcement provisions in the statutes, "fully confirmed by the legislative history." *Id.*, at 65.

No similar language in ERISA's text or history is cited to show that tax claims against a state or state agency must be treated as exclusively federal suits. Claims against a state for a refund of taxes are not remotely like benefit claims under a plan or employment contract disputes under the Labor Management Relations Act 29 U.S.C. §151, *et seq.* (1973). While a claim for benefits from an ERISA plan may be "purely a creature of federal law", a claim for a refund of taxes from a state is not such a creature. *CLVT, supra*, at 23. Instead, Congress intended ERISA (like the LMRA) not to exclusively control important state sovereign functions, as shown by the fact that states are exempted from the substantive provisions of both the LMRA and ERISA. 29 U.S.C. §152(2) (Supp. 1991); §§1002(32) (Supp. 1991), 1003(b)(1) (1985).

Claims against a state for a refund of taxes, like claims against a state for payment of

pension benefits, are not federal ERISA claims. The unique importance of state tax administration, the absence of Eleventh Amendment abrogation, and the absence of any specific language of intent to make state tax claims exclusively federal show that Congress has not displaced general state tax remedies "in an ERISA setting". Even if it were possible to reach such a "drastic" conclusion, it would require more support than "the preemption factor."

Similarly, it makes little sense to allow the State to bring a tax collection action related to ERISA as plaintiff in state court while requiring the State to defend the same tax with the same issues only in federal court. To construe ERISA in this manner might encourage some unseemly races to the courthouse whenever ERISA touches upon an issue of state taxation. Application of the well pleaded complaint rule to ERISA issues ought to depend ultimately on the nature of the claim rather than the identity of the party bringing it.

The concurring opinion in ***E-Systems*** sought to provide a better rationale for the Court of Appeals holding and correctly recognized that the State's tax remedies are generally available to challenge state taxes on the grounds of federal preemption. The concurrence, however, makes an assumption about what the Texas appellate

courts would conclude about the preemptive effect of federal ERISA jurisdiction in a tax case. The concurrence then defers to that assumption. The concurrence also overlooks the Court's unanimous holding in ***CLVT*** that preemption by ERISA of a tax claim on the merits is quite distinct from preemption of the state cause of action by which the claim is presented.

If ERISA preempts state court jurisdiction over state tax disputes it must be because of what Congress has said in the statute, not because of a state court decision in another context. Nothing indicates that the Texas Supreme Court would treat the State defending its taxes the same as an individual ERISA beneficiary litigating her ERISA benefits. ***Gorman v. Life Ins. Co. of North America***, 34 Tex. Sup. Ct. J. 457 (March 27, 1991). The state courts certainly have not held that ERISA preempts the State's tax protest or tax injunction statutes.[7] Moreover, state court decisions do not conclusively decide questions of federal jurisdiction. The state district court which issued the first injunction against ASTA

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[7]***Gorman*** is actually a rather tardy recognition by the Texas Supreme Court of the force of ERISA on the claims of ERISA beneficiaries. ***See Ingersoll-Rand Co. v. McClendon***, 111 S.Ct. 478 (1990). It does not mean that the Texas Supreme Court would be as willing as the Court of Appeals to entirely overlook the sovereign character and interests of the State.

expressed no doubt about its subject matter jurisdiction to determine ERISA preemption, and neither does the State.

Although Respondents argued and the federal district court accepted that the State's tax remedies were uncertain, the Court of Appeals declined to rely on this alternate ground to maintain jurisdiction despite the Tax Injunction Act. The State's tax protest and other remedies are more than adequate to meet the requirements of the Tax Injunction Act. ***Alnoa G. Corp. v. Houston***, 563 F.2d 769 (5th Cir. 1977), ***cert. denied***, 435 U.S. 970 (1978); ***City of Houston v. Standard-Triumph Motor Co.***, 347 F.2d 194 (5th Cir. 1965), ***cert. denied***, 382 U.S. 974 (1966)[8].

If the Court of Appeals had adopted the district court's additional rationale, it would still be wrong. Under Texas law the "taxpayer", for purposes of maintaining a tax protest suit, is the person who paid the tax rather than the

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[8]In a recent case discussing the adequacy of state tax remedies for purposes of constitutional due process, the Court identified several types of remedies which would be adequate. ***McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation***, 110 S.Ct. 2238 (1990). Because the Tax Injunction Act requires that the state court remedy "meets certain minimal ***procedural*** criteria", ***McKesson*** is instructive. ***Rosewell, supra***, at 512. A State may provide a 'predeprivation process' by authorizing suit for an injunction. ***McKesson, supra***, at 2254. A state may also provide postdeprivation relief in the form of refunds of taxes paid under protest with interest. Texas provides both types of relief.

person who should have paid. ***Bernard Hanyard Enterprises v. McBeath***, 663 S.W.2d 639 (Tex. App. - Austin 1984, ***writ ref'd n.r.e.***). Respondents (except La Quinta) were pursuing their tax protest remedy in state court when they decided to argue that the State would be unable to refund the taxes if they won the protest suit.

Under their 'catch 22' theory, the payment of protested taxes into the State's general revenue fund (rather than a suspense account) and the absence of a specific appropriation for a refund of ASTA taxes meant that the State could not refund the money. However, the State's ability (and obligation) to refund taxes to prevailing tax suit plaintiffs is plain, speedy and efficient as a matter of law. The State's general tax remedies are intended, and must be construed, to give real relief to aggrieved tax litigants, not to be some kind of dirty trick to deny refunds based on an accounting technicality.

Neither Respondents nor the lower courts have cited any cases (and there are none) where the State simply failed to pay a tax suit judgment against it[9]. The protest statutes

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[9]The general appropriation statute provided that "money deposited into the State Treasury which is subject to refund as provided by law shall be refunded from the fund into which such money was deposited, and so much as is necessary for said refunds is hereby appropriated." Texas Appropriations - General Act, 70th Leg., 2nd C.S. Ch. 78, Art. V, Sec. 29 1987 Tex. Gen. Laws 253, 846.

expressly require a refund (or credit) of taxes with interest to a successful litigant. TEX. TAX CODE ANN. §§112.060, 112.107 (Vernon Supp. 1991); TEX. GOV. CODE ANN. §§403.211, 403.220 (Vernon 1990). "If ... money paid under protest was unlawfully demanded ... the treasurer shall refund the proper amount, with pro rata interest earned on that amount, ..." TEX. TAX CODE ANN. §112.060(a) (Vernon 1982). A refund of protested taxes plus interest to a successful litigant is not uncertain or speculative, but is clearly provided as a matter of law.

Furthermore, Texas, unlike many states, provides injunctive relief in tax matters, and makes such relief available to "the applicant", *i.e.*, not exclusively to "the taxpayer". TEX. TAX CODE ANN. §112.107 (Vernon Supp. 1991), TEX. GOV. CODE ANN. §403.212 (Vernon 1990). Thus, Respondents have adequate relief in state court either under the protest or the injunction statutes. The state district court, in fact, accepted Respondents' rather speculative and fanciful arguments about the adequacy of their protest remedy, allowed taxes to be deposited into the registry of state court, and enjoined the State from collecting or enforcing the ASTA tax.

Still not satisfied, Respondents sought and obtained the federal injunctions now on appeal. Plainly, there is no need to subject the State to two injunctions. The federal district court did

not point out any inadequacy of the state court's injunctive relief. The existence of an adequate state remedy for purposes of the Tax Injunction Act does not depend on whether a remedy is wisely or correctly employed by a litigant. ***Ford Motor Credit Co. v. Louisiana Tax Comm'n.***, 440 F.2d 675 (5th Cir. 1971). Similarly, the confusion fostered by persons paying taxes which they clearly do not owe cannot be used to subvert the availability of tax remedies which exist as a matter of law.

Finally, even if some Respondents were to argue that they did not pay the tax and are therefore entitled to federal injunctive relief, the Court should consider whether they are barred by the Tax Injunction Act in respect of a liability actually paid and contested by the plans and trusts under their control. ***Alcan, supra***. The plans and trusts who paid the ASTA tax under protest in state court are entirely controlled by the Respondent trustees, administrators and sponsors. This is the same complete control which existed in ***Alcan***, and the same principles should apply for purposes of the Tax Injunction Act.

ERISA, TAXATION AND PRINCIPLES OF FEDERALISM

Congress did not subject the states to ERISA for purposes of regulating state retirement and benefit plans, but did give state courts the power to hear ERISA benefit claims. 29 U.S.C. §1003(b)(1) (1985), §1132(a)(1)(B) (1985). State courts routinely deal with federal statutory and constitutional issues, including direct Commerce Clause challenges to state taxes. ***See, e.g., Complete Auto Transit, Inc. v. Brady***, 330 So.2d 268 (Miss. 1976), ***aff'd***, 430 U.S. 274 (1977). The Supremacy Clause itself gives to "the Judges in every State" the duty of maintaining federal law as "the supreme Law of the Land". U.S. CONST., art. VI, cl. 2.

In view of these and other considerations, it would be very unlikely and very odd that Congress implicitly intended ERISA to oust state courts of their jurisdiction over state taxes in order to secure ERISA's enforcement. Certainly the State recognizes the supremacy of federal law. If it is ultimately determined that ERISA preempts (or eviscerates) ASTA, so be it.

The more fundamental question for the Court in these cases is not merely whether a particular state tax may be preempted, but whether the sovereign power of a state to defend its taxes in its own courts must be destroyed in

the interest of maintaining the supremacy of federal law. Our federal system establishes a balance of powers, a balance of dignities, between the federal and state governments. ***Martin v. Hunter's Lessee***, 14 U.S. (1 Wheat.) 304 (1816). That balance is properly maintained when state courts are allowed to perform their constitutional duties to uphold the supremacy of federal law. The constitutional balance need not and should not be altered by ERISA.

"Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." ***Garcia v. San Antonio Metropolitan Transit Authority***, 469 U.S. 528, 556 (1985). It is questionable that Congress, acting under the Commerce Clause, would ever legislate directly to destroy the State's power to decide the validity of a state tax in state court. U.S. CONST. art. IV, §4[10]; U.S. CONST. amend. X[11]; 28 U.S.C. §1341 (1976). Surely no such drastic intent can be presumed in ERISA, without discussion, from congressional silence. ***Employees, supra; Ashton, supra***, at 822.

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[10]The United States shall guarantee to every State in this Union a Republican Form of Government, ...

[11]The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The right to litigate its taxes in its own courts is obviously one of the most important sovereign attributes of state government. Even the usual requirements of constitutional due process are modified in the context of state taxation. ***McKesson, supra.*** The State's "exceedingly strong interest" in its tax system must be considered in evaluating Congress' intent in ERISA. ***Id.***, at 2250. ***Garcia, supra.***

Depriving states of jurisdiction over state taxes, even more than subjecting them to federal jurisdiction, requires a careful analysis of the principles of federalism. The power of states to resist federal suit except by consent or congressional abrogation is clearly supported by the principles of federalism found in the Tenth Amendment and elsewhere in the Constitution as well as in the Eleventh Amendment. The strict requirement for congressional abrogation, while tied to the Eleventh Amendment by precedent, can be seen as a particular instance of a doctrine which ought to apply generally to federal-state relations under the Constitution. If important state sovereign functions are to be affected or controlled by federal statutes, Congress must say so explicitly.

The Tenth Amendment protections of the political process should at least require an unmistakably clear declaration of intent by

Congress before the states' sovereign power and dignity will be subordinated under a federal statute. ***South Carolina v. Baker***, 485 U.S. 505 (1988); ***Atascadero, supra***. Anything less, anything in federal statutes which by implication appears to treat the states as ordinary private persons, represents a defect in the constitutional political process. Statutory provisions which involve fundamental issues of federalism, such as jurisdiction and taxation, should not be applicable to the states by mere implication.

If this Court somehow finds that Congress in ERISA did intend to deprive state courts of their power to hear state tax cases, the Court should inquire whether such an intent is constitutionally permissible. Although the Court has apparently limited protection of the state's constitutional sovereign interests to the political system, the Court should reconsider whether this (or any other constitutional guarantee) can rely solely on the good will and judgment of congressional politics. Despite the obvious difficulties of determining what specific state activities are protected by the Constitution, a federal Commerce Clause statute which takes away the power of states to litigate their own tax statutes in state court goes too far.

ERISA AND ASTA

If the Court somehow determines that it has jurisdiction over the merits, the Court must consider whether any part of ASTA represents a valid exercise of state authority. It is undisputed that ERISA leaves open the State's power to regulate the business of insurance. 29 U.S.C. § 1144(d)(2)(A) (1985). ***Metropolitan Life Ins. Co. v. Massachusetts***, 471 U.S. 724 (1985). It is, therefore, logical and proper that the State of Texas would seek to regulate and tax the insurance business up to, but not over, the boundary created by ERISA. Petitioners concede, as they voluntarily conceded at oral argument in the Court of Appeals, that ASTA relates to ERISA. That fact is only the beginning of the analysis.

The Texas legislature expressly intended not to apply ASTA where it would be preempted. ASTA §4(d). The Texas legislature should be taken at its word rather than be accused by implication of pursuing an improper objective. ***E-Systems,*** at 1102, Appendix, p. 4a. The ASTA tax does not apply to plans and trusts and has never been assessed against them. If ERISA is such an incredible tarbaby that states can not even legislate around it, perhaps the whole of ASTA will fall. The better choice is to determine what provisions of ASTA survive as a matter of statutory construction.

In ERISA Congress did not "alter, amend, modify, invalidate, impair or supersede" the McCarran-Ferguson Act, 15 U.S.C. §1011, *et seq.* (1976), 29 U.S.C. §1144(d) (1985). "Congress declares the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U.S.C. § 1011 (1976). "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a) (1976) (emphasis added). The "relate to" language of McCarran-Ferguson is no less broad than the "relate to" language of ERISA.

Multiple employer welfare arrangements (MEWAS) and plans providing death benefits are subject to state insurance regulation even though they are specifically recognized as ERISA entities. 29 U.S.C. §§1144(b)(2)(B), (6)(A) (1985). Furthermore, third party or "contract" administrators, who are often licensed insurance companies providing stop-loss coverage, frequently perform the claims adjustment services and claims processing services associated with the payment of ERISA benefits. These entities are subject to the state's general powers of insurance regulation,

which are preserved in ERISA. Third party administrators, whose activities are subjected to tax by ASTA, are not even mentioned in ERISA.[12] An overbroad interpretation of ERISA preemption will create a regulatory void contrary to the interests of ERISA itself and of the people of Texas and other states.

Congress easily could have made ERISA an exception to McCarran-Ferguson or omitted the insurance saving clause, but it did not. The "deemer" clause only provides that plans and trusts shall not be deemed to be insurance companies, thus leaving open the question of whether third party administrators can be considered part of the insurance business for purposes of state regulation. Congress certainly has not said that even licensed insurance companies can not be deemed to be in the business of insurance when they perform administrative claims and adjustment services. Furthermore, the "business of insurance", for purposes of the State's regulatory and tax authority, is broader than the range of anticompetitive practices exempted from the

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[12]The State has also established regulations for third party administrators under the Texas Insurance Code, Art. 21.07-6. The regulations set standards for persons who adjust or settle claims in connection with life, health and accident benefits. *Id.* §1. The regulations do not apply to employers acting for their employees or affiliates, unions acting for their members, tax exempt trusts and various others. *Id.* §1(A), (B), (H).

federal antitrust laws in 15 U.S.C. §1012(b) (1976).

Admittedly, ERISA is all powerful within its sphere. However, despite the concerns of many and the hopes of some, ERISA's proper influence should not be felt at the limits of the known universe.[13] ERISA effectively establishes a system of private insurance offered through the plans.[14] Congress has made this private insurance under a plan an exclusive federal ERISA domain, but Congress expressly saved the states' authority under McCarran-Ferguson and their own police powers to regulate and tax the business of insurance even where that business involves ERISA plans. ***Metropolitan Life Ins. Co., supra; General Motors Corp. v. California State Board of Equalization***, 815 F.2d 1305 (9th Cir. 1987), ***cert.***

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[13] "Unfortunately, there is little that I or any other member of this court can do about this deplorable demise of state-given rights other than to lament their passage." ***Cathey v. Metropolitan Life Ins. Co.***, 805 S.W.2d 387, (Tex.) (Doggett, J., concurring), ***cert. denied***, 111 S.Ct. 2855 (1991). "ERISA has become more than mere quicksand; it has become a black hole." ***Id.***

[14] Although often described as "self-insurance", that term is, in fact, an oxymoron. The essential characteristic of "insurance" is a contractual relationship involving the spreading of risk. A person may save for a rainy day, but cannot spread his risk of loss to himself any more than he can contract with himself. ERISA allows sponsors to create plans, like the Respondents' plans, providing benefits and spreading the risk to a limited class of persons (employees and dependents) rather than to the public generally.

denied, sub nom., General Motors Corp. v. Bennett, 485 U.S. 941 (1988).

Congress has entirely preempted the field regarding actions for benefits and other actions within the ERISA universe, but that does not mean that an outside entity doing business with an ERISA entity is not subject to state regulation and taxation. Non-fiduciary insurance companies and third party administrators perform functions for the general public even where they are compensated by private ERISA plans. Neither the plain language nor the intent of Congress should be construed to exempt from state regulation and taxation persons doing an insurance type business not within, but within the shadow of, ERISA.

INTEREST

If the Court somehow determines that the State must pay damages from the State Treasury to Respondents in these cases, the Court must still consider the proper measure of prejudgment interest. The district court awarded interest at various rates ranging from 7.262% to 11.770% based on the rate equivalent to income from investments of the various plans.

This Court has previously considered the question of pre-judgment interest where a taxpayer is entitled to a refund of taxes based on

the assertion of a federal right. ***Board of Commissioners v. United States***, 308 U.S. 343 (1939). "Beneficiaries of federal rights are not to have a privileged position over other aggrieved taxpayers in their relation with the States or their political subdivisions." ***Id.*** at 352. Accord, ***West Virginia v. United States***, 479 U.S. 305 (1987).

The rate of interest on taxes paid under protest in Texas is denominated "pro rata" interest and is calculated using the total amount of interest earned by the State on its deposits and then determining a taxpayer's share based on the amount of its protest payment. TEX. TAX CODE ANN. §§112.060 and 112.107 (Vernon Supp. 1991), TEX. GOV. CODE ANN. §§403.211, 403.220 (Vernon 1990). Other courts have relied on state law in non-tax cases to determine the proper rate of pre-judgment interest under ERISA. ***Dependahl v. Falstaff Brewing Corp.***, 653 F.2d 1208 (8th Cir. 1981), ***cert. denied***, 454 U.S. 968 and 454 U.S. 1084 (1981). Awarding a higher rate based on the plans' investment returns plainly contravenes the holding of the Court in ***Board of Commissioners, supra.***

Pre-judgment interest is granted in response to considerations of fairness. ***Blau v. Lehman***, 368 U.S. 403, 414 (1962). ERISA does not expressly provide for an award of pre-judgment interest. Absent a statutory mandate, the award of pre-judgment interest is generally

discretionary with the trial court. ***Whitfield v. Lindemann***, 853 F.2d 1298 (5th Cir. 1988), ***cert. denied, sub nom., Klepak v. Dole***, 490 U.S. 1089 (1989). Congress' primary concern in ERISA is for the financial welfare of the plans. ***Massachusetts Mutual Life Ins. Co. v. Russell***, 473 U.S. 134 (1985).

Where the plans and trusts are funded on an "as-needed" basis, it is improper to substitute borrowing rates or intercorporate rates of return for actual investment income. If actual plan assets have not been spent, there is no justification or need to use a special measure of interest based on income from those assets. Respondents only requested the usual federal rate provided by 28 U.S.C. §1961 (Supp. 1991). While more reasonable, this measure also contravenes the Court's holding in ***Board of Commissioners*** that all taxpayers should be treated equally.

ASTA by its own terms does not apply where preempted or prohibited by federal law or the Constitution. ASTA §§4 (a), (c), (d). Some Respondents, while claiming preemption, paid the tax out of plan assets and not pursuant to any demand, assessment or collection action by the State. Therefore, any damages for loss of use of the funds by those Respondents were incurred voluntarily. It is hard to see how plans and fiduciaries have performed in accordance

with their duties under ERISA by paying a tax which was never demanded of them and which expressly stated that it did not apply where preempted. 29 U.S.C. §1103(c) (Supp. 1991). ASTA §4(d). Considerations of fairness should not require the State to pay for additional damages which were self-inflicted.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

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